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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, THE HONORABLE FRANCIS J. CAFFEY, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, AND ALUMINUM COMPANY OF AMERICA, A CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General prays that a writ of certiorari be issued to review a judgment of the Circuit Court of Appeals for the Second Circuit entered in this cause on October 28, 1947, which denied a petition of United States of America for a writ of mandamus directed to Honorable Francis G. Caffey, United States District Judge for the Southern District of New York (who retired subsequent to the judgment of the Circuit Court of Appeals), to execute a mandate of the Circuit Court of Appeals and dismiss proceedings inconsistent therewith.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 358-362) is reported in 164 F. (2d) 159. The opinion of that Court upon which the mandate is based is reported in 148 F. (2d) 416.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 28, 1947. The jurisdiction of this Court is invoked under Section 29 of 15 U. S. C. as amended by the Act of June 9, 1944, Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 262 of the Judicial Code.

QUESTION PRESENTED

Whether, following hearing and determination of an appeal by a circuit court of appeals pursuant to a certificate from this Court under Section 29 of 15 U. S. C. as amended by the Act of June 9, 1944, jurisdiction to issue the writ of mandamus herein sought to compel execution of the mandate of the Circuit Court of Appeals and the dismissal of proceedings inconsistent with the mandate, resides in this Court or in the Circuit Court of Appeals.

STATUTES INVOLVED

The Act of June 9, 1944, c. 239, 58 Stat. 272 (15 U. S. C., Supp. V, 29) provides in part as follows:

In every suit in equity brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided, however,* That if, upon any such appeal, it shall be found that, by reason of disqualification, there shall not be a quorum of Justices of the Supreme Court qualified to participate in the consideration of the case on the merits, then, in lieu of a decision by the Supreme Court, the case shall be immediately certified by the Supreme Court to the circuit court of appeals of the circuit in which is located the district in which the suit was brought which court shall thereupon have jurisdiction to hear and determine the appeal in such case, and it shall be the duty of the senior circuit judge of said circuit court of appeals, qualified to participate in the consideration of the case on the merits, to designate immediately three circuit judges of said court, one of whom shall be himself and the other two of whom shall be the two circuit judges next in order of seniority to himself, to hear and determine the appeal in such case, and it shall be the duty of the court, so comprised, to assign the case for argument at the earliest practicable date and to hear and determine the same, and the decision of the three circuit judges so designated, or of a majority in number thereof, shall

be final and there shall be no review of such decision by appeal or certiorari or otherwise.

Section 2 of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209 (15 U. S. C. 2) provides as follows:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4 of the Sherman Act, 26 Stat. 209, as amended by the Act of March 3, 1911, c. 231, § 291, 36 Stat. 1167 (15 U. S. C. 4) provides in part as follows:

The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

STATEMENT

This proceeding grows out of a case brought by the United States against Aluminum Company

of America (sometimes hereafter referred to as Alcoa) and other defendants to prevent and restrain violations of the Sherman Act. After a trial of more than two years' duration the District Court dismissed the complaint. An appeal was allowed by this Court, which, on June 12, 1944, declaring that a quorum of six Justices to hear the case was wanting, certified the appeal to the Circuit Court of Appeals for the Second Circuit pursuant to an amendment of June 9, 1944, to Section 29 of 15 U. S. C.

The Circuit Court of Appeals in an opinion filed on March 12, 1945, reversed the judgment of the District Court and held that Aluminum Company of America had monopolized and was monopolizing the aluminum ingot market of the United States in violation of Section 2 of the Sherman Act, 148 F. 2d 416. The Circuit Court of Appeals ordered judgment of monopolization and injunctions; as to the Government's prayer for dissolution the Circuit Court of Appeals committed to the District Court determination of whether Aluminum Company of America should be dissolved and the form of any dissolution, to be determined by the District Court after the agency charged with disposal of the Government's wartime aluminum plants and facilities should have performed its functions. The mandate of the Circuit Court of Appeals remanded the case to the District Court for proceedings not inconsistent with the opinion. (R. 15.)

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On April 23, 1946, the District Court entered its judgment on the mandate, in which it held that the defendants had monopolized trade and commerce in aluminum ingot up to the close of the trial on August 14, 1940, in violation of the Sherman Act, and that the defendants had engaged in a price squeeze with respect to ingot and aluminum sheet prices; the court thereupon enjoined Alcoa and its officers from continuing the price squeeze (R. 16-34). The court retained jurisdiction of the cause until after the Surplus Property Administrator shall have proposed a plan for disposition of the Government owned aluminum facilities in order that the Attorney General might institute proceedings for the dissolution or partial dissolution of Alcoa or for the enforcement of such plan "and for the purpose of enabling Aluminum Company to apply to this court for a determination of the question whether it still has a monopoly of the aluminum ingot market in the United States" (R. 33-34).

On March 31, 1947, pursuant to the quoted provision, Alcoa filed a petition in the District Court praying that a "final judgment" be entered adjudicating that Aluminum Company of America no longer has a monopoly of the aluminum ingot market of the United States and that, in consequence of the termination of such monopoly, competitive conditions have been restored in the aluminum industry (R. 35-94). The United States first moved unsuccessfully before Judge

Caffey to dismiss this petition (R. 95-98). After overruling the Government's motion, Judge Caffey set the question of Alcoa's present status as a monopoly for hearing on October 15, 1947 (R. 99-102). The United States on September 11, 1947, filed a petition for a writ of mandamus in the Circuit Court of Appeals for the Second Circuit to require Judge Caffey to execute the mandate of that court by vacating so much of paragraph 12 of the judgment of the District Court "as reserves jurisdiction to enable Alcoa to apply for a determination whether it still has a monopoly, and to dismiss the petition of Alcoa," and prayed further for dismissal of Alcoa's petition and a stay of the trial proceeding scheduled to commence on October 15, 1947 (R. 1-6).

The basis for the petition for mandamus was that the petition of Alcoa and the ruling of the District Court in sustaining it against the Government's objection and setting it for trial was in conflict with the mandate of the Circuit Court of Appeals since it would make the right to dissolution depend upon whether Aluminum Company of America presently has a monopoly, instead of depending upon a consideration of the remaining effects of adjudicated monopoly and the need to dissipate them and disable a monopolist, with a history of 28 years of active monopolization, from future monopolization. Additional grounds for granting mandamus were asserted to be that only the United States has standing to bring on pro-

ceedings for determination of the need for dissolution, and that the condition precedent fixed by the Circuit Court of Appeals for the District Court's inquiry into the need for dissolution—disposal of the Government's aluminum plants and facilities—has not occurred, inasmuch as the Congressionally approved disposal program is in its incipiency and has not been substantially executed. (R. 3-6; see the Government's petition for mandamus in this Court, No. 323, Misc., and brief in support thereof, filed herewith, for a more complete statement.)

The Circuit Court of Appeals, by order filed October 28, 1947, dismissed the petition for mandamus upon the ground that it was without further jurisdiction in the cause and that any jurisdiction to enforce its mandate by mandamus was in this Court (R. 358-362).

The Circuit Court of Appeals concluded that jurisdiction to grant mandamus would exist only in aid of a future jurisdiction in the cause, and that since an appeal from a judgment following trial of the petition of Aluminum Company of America would be to this Court, the Circuit Court of Appeals was without authority to issue mandamus, or even to construe its mandate for the guidance of the District Court, unless this Court should again certify the case to the Circuit Court of Appeals because of inability to obtain a quorum.

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SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that its jurisdiction granted by certificate of this Court pursuant to Section 29 of Title 15 U. S. C. did not include jurisdiction to issue a writ of mandamus to require execution of the mandate of the Circuit Court of Appeals.
2. In holding that its authority to issue mandamus to require compliance with its mandate ended with the end of the term in which the mandate was directed to the District Court.
3. In holding that its jurisdiction to issue mandamus to require compliance with its mandate depended upon the existence of future jurisdiction in that court.
4. In holding that its authority to interpret its mandate ended with the end of the term in which the mandate was directed to the District Court.

REASONS FOR GRANTING THE WRIT

1. The Government believes that the District Court, in ordering a hearing at Alcoa's instance as to whether Alcoa presently has a monopoly, is proceeding in manner contrary to the mandate of the Circuit Court of Appeals. Mandamus is an appropriate remedy to require a lower court to obey the mandate of an appellate tribunal. *In re Sanford Fork & Tool Co., Petitioner*, 169 U. S. 247; *Gaines v. Rugg*, 148 U. S. 228; *In re Potts, Petitioner*, 166 U. S. 263; *Federal Communica-*

tions Comm'n v. Pottsville Broadcasting Co., 309 U. S. 134. The Government is unquestionably entitled to a determination by some appellate court as to whether the proceeding in the District Court is in conflict with the mandate of the Circuit Court of Appeals.

The question raised by this petition is whether jurisdiction to determine that issue lies in the Circuit Court of Appeals or in this Court. If the decision below is correct, this Court alone has such jurisdiction; because of that possibility the Government is filing herewith in this Court a separate motion for leave to file a petition for mandamus to compel the District Court to comply with the mandate of the Circuit Court of Appeals. If the decision below is incorrect, this Court would not entertain the Government's petition for mandamus, and the Government would lose its right to a determination of its right to mandamus in either court unless this Court grants this petition for certiorari and sets aside the decision below in this proceeding.

This case is obviously one of great public importance. As the Circuit Court of Appeals recognized (R. 361), it involves "the proper reconstruction of one of our great industries." Apart from this, the case falls within the general class of anti-trust equity suits which Congress has deemed of sufficient national significance to except from this Court's normal discretionary jurisdiction and to

permit direct appeal to this Court from the district courts. Except for the unique circumstance of lack of a quorum when the case first came to this Court, the entire appellate proceeding would have been here and not in the Circuit Court of Appeals.

We submit that the issue here presented as to which court ~~shall~~ decide whether the District Court's action is in conformance to the mandate is one upon which the Government is entitled to the conclusive determination which only this Court can provide, and that the point is clearly important enough to warrant the granting of certiorari.

2. The Government is not as much concerned in this matter with which court—Circuit Court of Appeals or Supreme Court—hears its application for mandamus as with assurance that one court or the other will do so. Nevertheless, the Government filed its petition originally with the Circuit Court of Appeals because it thought that court the proper tribunal. The normal rule, of course, is that the appellate court which enters a judgment, has jurisdiction to enforce it by writ of mandamus (*In re Sanford Fork & Tool Co.*, 160 U. S. 247, 256; *Ex Parte Krentler-Arnold Hinge Last Co.*, 286 U. S. 533; *Morris v. Securities and Exchange Commission*, 116 F. 2d 896, 898 (C. C. A. 2); *S. S. Kresge Co. v. Winget Kickernick Co.*, 102 F. 2d 740 (C. C. A. 8)), and this power exists

in aid of the appellate court's past jurisdiction, already exercised, without regard to whether the appellate court also possesses "future" jurisdiction over the controversy (*Sibbald v. United States*, 12 Pet. 488; *Heine v. Levee Commissioners*, 19 Wall. 655, 660; *Virginia v. Rives*, 100 U. S. 313, 316, 323, 327, 329; *Labelle County Commissioners v. Moulton*, 112 U. S. 217. Cf. *Baltimore & Ohio Railroad v. United States*, 279 U. S. 781; *In re Washington & Georgetown Railroad Co.*, 140 U. S. 91 (mandamus deemed appropriate where amount in controversy was too small to support writ of error); *City Bank of Fort Worth v. Hunter*, 152 U. S. 512. (propriety of mandamus recognized where no further appeal was possible because the amount in controversy was below the jurisdictional requirement)).

3. Although Judge Caffey resigned on October 31, 1947 (after the Circuit Court of Appeals denied the application for mandamus), Judge Caffey's orders are the law of the District Court and must be followed by any judge designated to succeed Judge Caffey in the case, according to the rule and practice prevailing in the Second Circuit. *Commercial Union of America, Inc. v. Anglo-South American Bank, Ltd.*, 10 F. 2d 937 (C. C. A. 2); *In re Hines*, 88 F. 2d 423 (C. C. A. 2); *United States v. Steinberg*, 100 F. 2d 124 (C. C. A. 2); *Farmers' Loan and Trust Co. v. Miller*, 298 Fed. 758 (S. D. N. Y.); *Aachen & Munich*

Fire Insurance Co. v. Guaranty Trust Co., 24 F. 2d 465 (S. D. N. Y.).¹ That the writ of mandamus ultimately sought may be addressed to the inferior court as such is stated in *Virginia v. Rives*, 100 U. S. 313, 328.

CONCLUSION

This case is one of obvious public importance, and the question whether this Court or the Circuit Court of Appeals has jurisdiction to enforce the mandate of the latter court is one which should be finally determined by this Court. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 1948.

¹ Out of an abundance of caution the Government applied to the Senior Judge of the District Court for assignment of the case to another judge for the expressed purpose of enabling the Government, before applying for relief in this Court, to seek from the succeeding judge determination of whether Judge Caffey's orders would be reconsidered or, on the other hand, confirmed. The Senior Judge has declined so to assign the case, declaring:

"I don't see why you can't go ahead. I think the chances are a thousand to one that any Judge to whom the case may be assigned will follow Judge Caffey's ruling. The Circuit Court of Appeals has warned us on numerous occasions that that is the proper thing to do."

"* * * You can go ahead on that assumption that his ruling will stand." (See Appendix 2 to Petition for Writ of Mandamus.)